***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

# 76-1415

*To be argued by*
MARC MARMARO

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 76-1415**

UNITED STATES OF AMERICA,
*Appellee,*

—*v.*—

WALTER SWIDERSKI and MARITZA DE LOS SANTOS,
*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR THE UNITED STATES OF AMERICA


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## BRIEF FOR THE UNITED STATES OF AMERICA

### Preliminary Statement

Walter Swiderski and Maritza De Los Santos appeal from judgments of conviction entered on September 13, 1976, in the United States District Court for the Southern District of New York, after a three day trial before the Honorable Dudley B. Bonsal and a jury.

Indictment 75 Cr. 797, filed on August 8, 1975, contained two counts charging each defendant with having possessed with intent to distribute 21.5 grams of cocaine (Count One) and 7.6 grams of marijuana (Count Two), and aiding and abetting the same, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.

Trial commenced on October 21, 1975. Count Two was dismissed as to Swiderski at the conclusion of the

evidence on October 23, 1975. On October 23, 1975, the jury found Swiderski guilty on Count One and De Los Santos guilty on both Counts One and Two.

On December 8, 1975, Swiderski and De Los Santos were sentenced pursuant to 18 U.S.C. § 3651 to two-year terms of imprisonment, six months to be served in a jail-type institution, execution of the balance suspended, with concurrent three-year terms of probation and special parole following release from confinement. On that same date, Judge Bonsal set aside De Los Santos' conviction on Count Two.

The judgments of conviction entered on December 8, 1975 were reversed on appeal by this Court on the basis of errors in the trial court's charge on entrapment. *United States* v. *Swiderski*, 539 F.2d 854 (2d Cir. 1976).

Retrial commenced on July 20, 1976 and concluded on July 23, 1976 when the jury found both defendants guilty on Count One.

On September 13, 1976, Swiderski and De Los Santos were again sentenced pursuant to 18 U.S.C. § 3651 to two-year terms of imprisonment, of which six months was to be served in a jail-type institution and the execution of the balance of which was suspended, with concurrent three-year terms of probation and special parole to follow release from confinement.

Swiderski and De Los Santos are at liberty pending appeal.

## Statement of Facts

### The Government's Case

### A. Introduction

The Government's proof overwhelmingly demonstrated that the two defendants sought to purchase cocaine in early June, 1975 and did in fact purchase an ounce of cocaine for $1250. Unbeknownst to the defendants, who were then engaged to be married, the middleman to their transaction was a government informant, and consequently they were promptly arrested shortly after consummating their transaction.

Defendants attempted to blunt the evidence against them by contending that they carried $5000 into a run-down building on West 48th Street in Manhattan on June 3, 1975, the day of the sale of the one ounce of cocaine, because they intended to make purchases for their boutique later that day. The Government's rebuttal case demonstrated that their explanation was patently false.

### B. Martin Davis Becomes an Informant

In late summer of 1973, believing that the authorities were aware of prior marijuana sales by him, Martin Charles Davis, contacted the New York City Police Department in order to clear his record with respect to these sales before new and stricter New York drug laws took effect. (Tr. 19-21).* As a result of this inquiry, Davis

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* "Tr." refers to the transcript of the trial; "GX" refers to the Government's exhibits at trial.

was interviewed by a Sergeant Egan who offered him the opportunity of cooperating with the Police Department. This offer was declined. (Tr. 21-22).

Thereafter, Davis was introduced to Special Agents Joseph Keefe and Thomas Fekete of the Drug Enforcement Administration, New York Joint Task Force ("DEA"), and agreed to work as a paid informant.*

## C. The Informant Meets Swiderski and Discusses Drugs

During 1972, Davis was associated with a concern called Solid State Light, Inc., located in the Greenwich Village area of Manhattan, which manufactured electronic equipment and which displayed its equipment on weekends in electronic light shows. (Tr. 27, 83-85). In November or December 1973, Davis was introduced to Walter Swiderski during one of the weekend lightshows. At that time, Swiderski asked Davis if he wanted to buy a quantity of "THC", a substance Davis understood to be the active ingredient in hashish. Swiderski gave Davis a sample, and told him if he liked it, Swiderski would sell him a quantity of the drug. (Tr. 27-28).

During the next year and a half, Swiderski and Davis spoke on many occasions about the possibility of dealing in narcotics. (Tr. 27-28).

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* Under the terms of Davis' arrangement with DEA, he would receive $150 for any introduction to a narcotics violator which led to an undercover purchase of an ounce of hard drugs, either cocaine or heroin. For a period of time, Davis received a weekly stipend of $210 from DEA. During the year and a half of his cooperation with DEA, Davis received approximately $16,000 of which $10,000 or $11,000 was for his own use. (Tr. 22-25).

## D. Swiderski Asks to Purchase Cocaine

Swiderski called Davis on May 31, 1975 and told Davis that he wanted to buy a "quarter of cocaine." Davis invited Swiderski to a meeting with a number of drug dealers. Davis' initial impression was that Swiderski had intended to purchase a quarter of an ounce of cocaine. However, when Swiderski came later that evening to Davis' room at the Chelsea Hotel, he made it plain he was in the market for a quarter of a pound of cocaine.

To demonstrate the seriousness of his interest and to prove his ability to pay, Swiderski flashed a large amount of cash to the drug dealers present in Davis' room. The other drug dealers offered Swiderski substitute narcotics such as speed, but Swiderski was adamant about obtaining cocaine because another individual had requested that he obtain a quarter of a pound of cocaine. (Tr. 29-31).

The next day, Davis called Special Agent Fekete. Shortly thereafter, Davis was able, through an intermediary, to locate a willing, but cautious supplier for the cocaine—Carlton Bush. (Tr. 31-34).

On June 2, 1975, Davis again spoke with Swiderski on the phone and told him that the transaction could be completed the next day. Davis told Swiderski the price for the four ounces of cocaine would be $4600. The two men agreed to meet the next day. (Tr. 34-36).

## E. The June 3d Sale

At about three o'clock in the afternoon on June 3, Swiderski and his fiancee, the defendant De Los Santos, arrived at Davis' hotel room. Davis was shown a large stack of bills by his visitors. (Tr. 34-36). Then Davis,

De Los Santos, Swiderski and someone named "William" left the room and drove in Swiderski's van to meet with the suppliers of the cocaine.

They went to a studio apartment located at 55 West 48th Street. When they entered, Carlton Bush was already there. (Tr. 36, 103). Swiderski, Davis and Bush then went to a bedroom area where Bush produced a package of white powder. (Tr. 36-37). Swiderski summoned De Los Santos to the bedroom area where they snorted the cocaine and conducted burn and bleach tests to determine the cocaine's quality. (Tr. 37-38).

When Swiderski asked De Los Santos what she thought of the cocaine, she replied that while it was not good enough for their own personal use, they had a buyer who would purchase it from them. Swiderski told Carlton Bush that they could do business in the future in large quantities if Bush could obtain a higher quality of cocaine at a better price. Bush told Swiderski and De Los Santos that he had only brought one ounce into the apartment since it was the first time they had done business and that they could have the one ounce for $1250 and obtain the remaining three ounces later that night. Swiderski and De Los Santos were not pleased with the bifurcation of the transaction, but agreed. Thereafter, the $1250 and the one ounce of cocaine were exchanged. (Tr. 38-40).

## F. The Arrests of Swiderski and De Los Santos and Their Attempt to Flee

After the purchase was completed, Swiderski, De Los Santos and Davis left the premises, re-entered the van and returned to the Chelsea Hotel where Davis got out. (Tr. 103, 124). Swiderski and De Los Santos then

drove to 34th Street and 8th Avenue where Police Officer Lino, who had been surveilling the defendants' movements, pulled his car in front of the van and fellow officers blocked the van's retreat with their vehicle. (Tr. 103, 111). Police Officer Lino and his partner, Officer Lamirata, got out of their car and identified themselves as police officers. Swiderski then jockied the van back and forth, crashing several times into the DEA vehicles in an attempt to flee. (Tr. 103-04, 116). Pictures of the damage sustained by the DEA automobiles were introduced into evidence (Tr. 105-06, 179-81; GX 7-13).

Swiderski and De Los Santos were arrested. De Los Santos' purse contained a quantity of cocaine in a pouch, and $3700 in cash. Approximately $529 in cash was seized from Swiderski. (Tr. 105-06).

## The Defense Case

### A. Walter Swiderski

Swiderski testified in his own behalf. His exculpatory version of the facts was incredible on its face and was later directly contradicted by the Government's rebuttal case.

Swiderski stated that he was a 30 year old high school graduate with several semesters at Rutgers and Fairleigh Dickinson Universities. During the events in question Swiderski was living with and affianced to his co-defendant De Los Santos. At the time of the trial, Swiderski said he and De Los Santos were married. (Tr. 133, 166).

Swiderski testified that he first met Davis in November 1973 when Davis was introduced to him as a person who could supply him with marijuana. From November

1973 until June 1975, Swiderski met with Davis between 20 and 25 times. According to Swiderski, on a few of these occasions, Davis supplied him with marijuana and cocaine. (Tr. 136-37).

On May 31, 1975, which was Swiderski's birthday, Davis called him at home and offered to turn him on to some marijuana. (Tr. 139). Thereafter, Swiderski went to meet Davis at his room in the Hotel Chelsea. (Tr. 139-40). After trying the marijuana, Swiderski declined to purchase any but waited around for someone to arrive with cocaine which Davis had offered to Swiderski as a birthday present. (Tr. 140-41). According to Swiderski, "unfortunately" when the people arrived there was no cocaine, so Swiderski sampled some speed. (Tr. 139-40). Swiderski refused to take a large quantity of the speed but did purchase $65 worth. (Tr. 141-42). Ms. De Los Santos then called Davis' room to find out what was delaying Swiderski on his birthday. (Tr. 142).

Swiderski testified further that he did not speak with Davis, as Davis claimed, on either June 1 or 2, 1975. *Swiderski said that on those days both he and De Los Santos were busy attending the National Boutique Show where they were familiarizing themselves with different lines of clothing to order for their boutique.* (Tr. 143-44).

*Swiderski claimed that on June 3, 1975, the day the Government alleged the defendants willingly purchased an ounce of cocaine, he and De Los Santos were going to purchase several thousand dollars worth of stock for the store at the boutique show.* (Tr. 146-47). According to Swiderski, that morning Davis called and informed him that Davis was able to obtain some cocaine, and invited Swiderski to come to New York where Davis was to have a party. (Tr. 147-48). Swiderski testified that Davis'

story was "unbelievable" and, accordingly, Swiderski claimed he hung up the phone and went back to sleep. (Tr. 148). About an hour later Davis called again and again asked Swiderski to come to his apartment at the Chelsea Hotel. Swiderski agreed to see Davis. (Tr. 149).*

Later that afternoon Swiderski arrived with De Los Santos at the Hotel Chelsea. When they knocked at Davis' door, Davis allegedly "slipped out real quick" and told them that the party was someplace else. Swiderski said he told De Los Santos that they should leave the hotel. (Tr. 150-51).

Despite the fact that Swiderski and De Los Santos had allegedly planned to purchase merchandise at the boutique show and had withdrawn money from the bank for that purpose, Swiderski testified that they agreed to drive Davis and a friend of his named "Junior" to the party to save Davis and Junior taxi fare. (Tr. 149, 151-52). Then, following Davis' instructions, and despite De Los Santos' claimed protestations, Swiderski said he drove Davis and Junior to an apartment on 48th Street in Manhattan. When they arrived Davis said "[w]hy don't you come up? There is some cocaine here." Swiderski first hesitated, but then relented and entered the apartment together with De Los Santos, Davis and Junior. (Tr. 152-53). When they entered the apartment, they met two unknown men, one of whom was introduced to them as "C.B." (Tr. 156).

According to Swiderski, after he entered the room, Davis and C.B. went into the bedroom alone. Shortly thereafter Davis emerged into the living room and called Swiderski into the bedroom. When Swiderski entered the

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* Swiderski failed to provide any reason why this second phone call made the story "believable."

bedroom, he noticed that Davis was breaking up a white powder substance which rested on a mirror. (Tr. 156-57). Davis told Swiderski that the substance was cocaine and gave some to Swiderski to taste. Within a few minutes, Swiderski called De Los Santos into the room and everyone snorted cocaine. After a few minutes, Swiderski turned to De Los Santos and asked her if she was getting ready to leave.

Swiderski claimed that Davis then became excited, raised his voice and told them they had to purchase some cocaine. Swiderski and De Los Santos did not want to upset Davis or his friends, so they agreed with each other to buy a gram. (Tr. 157-59). According to Swiderski, Davis replied that a gram would not do, that they had "to take the whole package." (Tr. 159). As a result of the "stimulus" in the room and the excitement created by Davis and his friends, Swiderski asked De Los Santos for $1250, out of the $5,000 she was supposedly carrying to make purchases at the boutique show, and handed over the money to C.B. Swiderski said that the amount of the money was dictated by Davis and C.B. In response to the court's question, Swiderski said that they paid the $1250 "to leave the premises", but that before they left someone's hand dropped the white powder into De Los Santos' handbag. (Tr. 159-61).

Swiderski, De Los Santos and Davis left the apartment. Nothing was said to Davis about the incident because Swiderski planned to "sever all relationships with Davis", because he "didn't want anything to do with him anymore." (Tr. 161-62). Nevertheless, Swiderski and De Los Santos drove Davis back to the Hotel Chelsea. According to Swiderski, he did not, as Davis had testified, make any arrangements with Davis or C.B. to return to the apartment on 48th Street to make a further purchase of cocaine. (Tr. 161-62).

After dropping Davis off at the Chelsea, the van was stopped at 34th Street and 8th Avenue by two cars whose occupants surrounded the van with drawn guns. (Tr. 162-64). Swiderski denied knowing the individuals were police officers, said he thought he was being robbed and said he himself was calling for the police. As soon as he realized the individuals were police officers, he said he immediately stopped his car. (Tr. 164).

On cross-examination by Government counsel, Swiderski admitted that on many occasions he had purchased small amounts of marijuana from Davis and had tasted cocaine he had received from Davis on five or six occasions. Swiderski also admitted spending $65 out of his weekly earnings of $175 for an unknown white substance on May 31, 1975. (Tr. 181-85).

*Concerning the events of June 3, Swiderski repeated that De Los Santos was carrying several thousand dollars because she planned to make purchases at the boutique show. He claimed that he too was carrying several hundred dollars to make personal purchases at the show. Swiderski said that he and De Los Santos had spoken with a man named Dante about purchasing a large amount of furs for cash from him at the show. They also had discussions with a man named Abacus about purchases they would make at the boutique show.* (Tr. 185-88).

Swiderski insisted that the only reason he and De Los Santos entered the rundown building on 48th Street with several thousand dollars in cash was to snort cocaine. He likewise insisted that the sole reason he paid $1250 was to allow himself and De Los Santos to leave. (Tr. 190-94).

*Incredibly, Swiderski said that although he saw a package being dropped into De Los Santos' handbag in the*

*apartment, he never asked her after leaving the apartment what had been put in her handbag.* During the return trip to the Chelsea Hotel, he said nothing to Davis about what had occurred in the apartment. (Tr. 178-79).

## B. Maritza De Los Santos

De Los Santos testified in her own defense. Not surprisingly, her testimony was consistent with that of her co-defendant husband, and was equally incredible.

De Los Santos, a 25 year old graduate of Marymount College and owner of the Isle of View Boutique (Tr. 197-98), admitted to being an occasional user of cocaine and a more frequent user of marijuana. (Tr. 211-12).

With respect to the events of June 3, she said that she and Swiderski left their apartment in New Jersey that day with more than $5000 in cash contained in a black pouch. Ostensibly, the money was for cash and carry purchases at the boutique show. *De Los Santos said that by paying cash she could realize a savings at the boutique show of between 10-25 percent.* (Tr. 200).

The reason she and Swiderski stopped at Davis' apartment first was that he was having a party, which to her meant "smoking grass". De Los Santos said that "unfortunately" she had gone with Swiderski to other parties of Davis', and had used "grass" and cocaine on those occasions. (Tr. 202).

At the Chelsea Hotel she and Swiderski met Davis and another person. After inquiry by Swiderski as to where they were going, all four got in the van.

Davis asked them to drive him and his friend to 48th Street to save them cab fare. (Tr. 204). When they ar-

rived at 48th Street, Davis invited them up to the party and after some hesitation she entered the apartment along with Swiderski. Davis, Swiderski and one other person went into a small room. She claimed that she remained in a different room containing a piano.

Shortly afterwards, she was summoned into the other room by Swiderski where she snorted cocaine and agreed to "take" a gram. (Tr. 203-06). Davis allegedly insisted that they take the "whole thing." (Tr. 208-09). Then other men entered the room and she did not like the "air" in the room. (Tr. 209). She claimed that Swiderski asked an unknown male how much it would take to get out of the apartment and the unknown male asked for $1250. (Tr. 209-10). De Los Santos testified that she then gave her handbag or the black pouch to Swiderski who counted out the proper amount of money and paid for the drugs. (Tr. 209-10).

De Los Santos insisted that she had no intention of purchasing cocaine when she entered the apartment, that all she intended was to get "high with Marty and then go to the boutique show and take care of my business." (Tr. 208).

On cross-examination by the Government, De Los Santos testified that the cocaine was placed in her pocketbook by an unknown person. (Tr. 221-22). She reiterated that her sole reason for going to 48th Street with $5000 in cash was to get high and that she did so only after being assured everything was alright. (Tr. 217-18).

## The Government's Rebuttal Case

The Government's rebuttal case totally undercut the defendants' claims that they intended to use the $5000 in cash on June 3 for boutique show purchases; that

they had previously been to the show to familiarize themselves with the lines of clothing; that they had previously spoken to a Ms. Dante and Mr. Abacus about making purchases; and that they anticipated that by paying cash they could save 10-25 percent on their purchases.

Michael Gaetano, president of Abacus Imports said that he had participated in the National Boutique Show in the Hotel McAlpin in 1975. Gaetano testified that he did not receive an order at that show from either De Los Santos or Swiderski. Gaetano also said the largest sale his company made at the boutique show was $500. (Tr. 238-39). Gaby Drhion, a saleslady for Abacus, testified that records of her company indicated that no orders had been placed by De Los Santos' Isle of View Boutique. Despite the fact that her job at the show was to receive orders, she did not have any discussion with either De Los Santos or Swiderski concerning orders. Drhion also said that the samples at the show were not sold for a 25% discount. (Tr. 238-39).

Rania Dante, fashion designer for Rania Dante, Limited, testified that in 1975 her company manufactured furs. In June, 1975, she was in charge of a display room at the National Boutique Show. Dante testified she did not have any discussions with Swiderski or De Los Santos and did not recognize anyone in court. She said that her company never sold samples at the show, and it was never her practice to receive substantial amounts of cash for goods remaining on hand at the end of the show. (Tr. 239-41).

# ARGUMENT

## POINT I

### The Trial Court's Charge Properly Instructed the Jury as to the Meaning of Possession With Intent to Distribute.

Defendants argue that the trial court's instructions incorrectly defined "intent to distribute." More specifically, they claim that it was error to advise the jury that, if the defendants intended to transfer the cocaine between themselves, this constituted an "intent to distribute." On the contrary, this claim ignores the plain language of the Comprehensive Drug Abuse Prevention and Control Act of 1970 * (the 1970 Act), and, if accepted, would defeat Congress' intent to punish as felonies all physical transfers of narcotic drugs from one person to another.

### A. The Court's Charge

In charging the jury as to the meaning of the terms distribute and possess with the intent to distribute, Judge Bonsal stated:

> "Now, turning to what 'possession with intent to distribute' means, well, intent to distribute merely means that you intend at some point or later time to pass on all or some of it; it means you intend to sell it; it means you intend to give it away; you can intend to give it to a friend of yours *or somebody who is close to you.* If you are going to pass it on, that is to distribute under the statute." (Tr. 298-99) (emphasis added).

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* P.L. 91-513, 84 Stat. 1236.

Neither defense counsel objected to Judge Bonsal's formulation which clearly permitted the jury to convict if they concluded that De Los Santos intended to pass the cocaine to Swiderski.*

During the course of the jury's deliberations, the following note was received:

> "The jury would like
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> . . .
>
> (b) definition of intent to distribute;
>
> (c) clarification of the following:
>
> If both defendants possessed the drug (i.e., one paid for it and it was found in the

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* In the context of this case, the only meaning the phrase "someone close to you" could have had was a distribution between the two defendants, who at the time of the events in question were engaged to be married. Indeed during his summation Government counsel had explicitly argued, *inter alia*, this theory of distribution:

> "Where is the possession with intent to distribute? What do they intend to do with this? You are going to hear they did not intend to distribute this, therefore you got to acquit these people. Gentlemen, this is 21 grams. Maritza said one gram was sufficient. It is a blow; it is a snort. And the government asks you to infer from what happened that it is not beyond belief that a husband or a fiance and his girl friend would share that cocaine. *You don't have to go out on the corner and sell it. Do you believe that for one moment that Miss De Los Santos and Mr. Swiderski, who had just had a couple of blows upstairs, would not later on share it?*" (Tr. 252) (emphasis added).

The only objection to this definition by defense counsel was not taken because the charge permitted a conviction if the jury found De Los Santos intended to give the cocaine to Swiderski. Rather, counsel for De Los Santos complained that the charge permitted the jury to find that once De Los Santos "got it home she might have used it, and once she uses it, she is distributing it to herself." (Tr. 315-16).

> other's handbag) can 'intent to distribute' mean one giving the drug to the other or must third party be involved?" (Tr. 320).

In response, Judge Bonsal began by restating, with one minor variation, his earlier charge:

> "Now, the next one you want to know is a definition of intent to distribute. Now, in my charge I said to you:
>
> Now, turning to what 'possess with intent to distribute' means. What does that mean? Well, intent to distribute merely means that you intend at some point at a later time to pass all or some of it on. It could mean a sale; it could mean that you could give it away. You could give it away. You could give it to a friend of yours *or even to your fiancee.* If you are going to do that, that is a distribution." (Tr. 326) (emphasis added).

Then with respect to subsection (c) of the jury's note, the Judge said:

> "I am going to leave it with what I told you distribution means. I think that is your problem, to find that out." (Tr. 326).

Thus, the only change in the court's instruction was to substitute the term "fiancee" for "somebody who is close to you," * and the court left it to the jury to apply

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* Interestingly, in the first trial, Judge Bonsal defined the concept of possession with intent to distribute almost word-for-word in the same fashion as in the second trial. Judge Bonsal there stated:

> "Now turning to what 'possess with intent to distribute' means. What does that mean? Well, intent to distribute merely means that you intend at some point at a later

[Footnote continued on following page]

the definition of intent to distribute to the facts of the case.

## B. The Charge Was Entirely Correct

Both the initial charge and Judge Bonsal's answer to the jury's note state what is plainly a proper construction of the statute. That is, the act which brings an individual's conduct within the purview of 21 U.S.C. § 841(a) is the physical passing of a narcotic substance to another individual or possessing the substance with the intent to pass it to another person.

The statutory violation for which the defendants were convicted makes it unlawful "knowingly or intentionally . . . to . . . distribute . . . or possess with intent to . . . distribute" a narcotic drug. The definitional section of the 1970 Act equates the term "to distribute" with "to deliver," 21 U.S.C. § 802 (11), and "deliver" is further defined to mean "the actual, constructive, or attempted transfer of a controlled substance, *whether or not there exists an agency relationship.*" 21 U.S.C. § 802(8) (emphasis added).

Under the plain language of the statute, it was therefore entirely correct for Judge Bonsal to instruct the

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time to pass all or some of it on. It could mean a sale. It could mean you could give it away. *You could give it to a friend of yours or even to your fiancee.* If you are going to do that, that is a distribution." (Tr. 428 29) (emphasis added).

In the first trial, defense counsel who were the same attorneys who represented the defendants in the second trial, did not object to the statement that a distribution could occur between the two fiancees in this case. Moreover, in appealing from their convictions, neither defendant claimed as error Judge Bonsal's charge permitting the jury to find a distribution between De Los Santos and Swiderski.

jury that, if the defendants intended to transfer the cocaine among themselves, they possessed it with an intent to distribute.

The defendants argue in reply that, because they were joint venturers in obtaining possession of the drugs, they were exempt from any charge of distribution or possession with intent to distribute, so long as they transferred it only between themselves. This argument is nothing short of an invitation to this Court to rewrite the definition of "delivery" found in 21 U.S.C. § 802(8). For that statute provides that a "delivery" occurs "whether or not there exists an agency relationship" between the transferor and transferee. Indeed, the case law is quite clear that the 1970 Act was specifically designed to reach all participants in the distribution and delivery of controlled substances. See, *e.g.*, *United States* v. *Masullo*, 489 F.2d 217, 220-21 (2d Cir. 1973); *United States* v. *Marquez*, 511 F.2d 62, 63-64 (10th Cir. 1975); *United States* v. *Pierce*, 498 F.2d 712, 713 (D.C. Cir. 1974); *United States* v. *Miller*, 483 F.2d 61, 62 (5th Cir. 1973), *cert. denied*, 414 U.S. 1159 (1974); *United States* v. *Pruitt*, 487 F.2d 1241 (8th Cir. 1973); *United States* v. *Hernandez*, 480 F.2d 1044, 1046-47 (9th Cir. 1973); *United States* v. *Workopich*, 479 F.2d 1142, 1147 (5th Cir. 1973).

The defendants' response to all of this is that § 802 (8) does not mean what it says. They argue that the language making existence of an agency relationship irrelevant in deciding whether there has been a delivery was meant only to do away with the "procuring agent defense" which existed under the pre-1970 Federal narcotics laws. Under the prior law, sales of drugs, not distributions, were prohibited. The "procuring agent defense" permitted a defendant to contend that he had acted on instruction of a buyer to procure drugs from

another, and therefore was acting as a procuring agent of the buyer in facilitating a purchase, and not as a seller in facilitating a sale. See, *e.g.*, *United States* v. *Masullo*, *supra*, 489 F.2d at 220-21; *United States* v. *Winfield*, 341 F.2d 70, 71 (2d Cir. 1965); *United States* v. *Sawyer*, 210 F.2d 169, 170 (3d Cir. 1954).

To be sure, the cases on which Swiderski relies do state that the § 802(8) makes it clear that the "procuring agent defense" has been abolished. But neither the cases nor the legislative history cited by Swiderski support the view that § 802(8) was intended solely to accomplish that end. See *United States* v. *Masullo*, *supra* and *United States* v. *Marquez*, *supra*. Indeed, if Congress had had such a limited goal in mind, it surely would have been expressed in the Congressional history of the enactment, or Congress would have employed less sweeping language.

Moreover, well-settled principles of statutory construction fly in the face of defendants' attempts to ignore the plain language of § 802(8) by treating it as nothing more than a repeal of the "procuring agent defense." Since the "procuring agent defense" turned on concepts of sale and purchase, the defense was completely eliminated in 1970 when Congress described offenses in terms of distributions, not sales. See *United States* v. *Masullo*, *supra*, 484 F.2d at 220-21. Accordingly, unless § 802(8) is given its natural meaning, *i.e.*, that an agency relationship among the parties to a delivery of narcotics is irrelevant for purposes of determining whether there has been a distribution, the words "whether or not there exists any agency relationship" become superfluous. It is a well known maxim of statutory construction, however, that all words and provisions of a statute are intended to have meaning and are to be given effect, and words of a statute are not to be construed as sur-

plusage. See, *e.g.*, *McDonald* v. *Thompson*, 305 U.S. 263, 266 (1938); *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932); *Ex Parte Public National Bank*, 278 U.S. 101, 104 (1928).

In a case analogous to the instant case, the Ninth Circuit has held that the passing of narcotics between two individuals for their own personal use would constitute a distribution within the meaning of 21 U.S.C. §§ 841(a) and 802(8). *United States* v. *Branch*, 483 F.2d 955 (9th Cir. 1973) (*per curiam*). The question in *Branch* was whether a warrantless search of an automobile had been lawfully conducted, and resolution of that issue depended on whether the officer who conducted the search had had probable cause to believe a felony had been committed. The officer who conducted the search had received information from an informant that "a certain quantity of marijuana or hashish" was in Branch's car and that Branch and another individual had just "smoked a joint." 483 F.2d at 956. The Ninth Circuit held:

> "Even if the information received by the officer as to the quantity of controlled substance involved was not sufficient to support an inference of distribution or intent to distribute, *the additional information that appellant had '"smoked a joint"... with another person [the informer]' was. That information brought appellant's conduct within the 'distribution' ban of 21 U.S.C. § 841(a). See 21 U.S.C. § 802(11).* 483 F.2d at 956 (emphasis added)."

Not only does the plain language of the 1970 Act and the *Branch* decision support prosecution for possession with intent to distribute in a case such as this, but the statutory scheme enacted by Congress is entirely sensible. Congress sought to make any person who transferred

physical possession of a narcotic drug liable for felony prosecution whether the recipient was a joint venturer in possessing the drug, a constructive possessor or an unrelated third party. This was primarily in recognition that any physical transfer of a narcotic drug to another person permits use by the recipient and facilitates transfer to still another party. The evil sought to be deterred, therefore, was the physical movement of narcotic drugs from one person to another, and it was perfectly proper to seek to deter this evil, too, in the context of a joint venture or constructive possession.

Secondly, this statutory scheme making the greater offense turn on a physical transfer not only tends to deter such transfers, but it also creates a clear standard which avoids the creation of anomalous exceptions such as "the procuring agent defense" which plagued the pre-1970 law. The difficulties which the defendants' proposed interpretation of the 1970 Act would pose are readily discernible. For example, under the defendants' view of the statute, would a distribution have occurred if Swiderski had purchased the drugs at De Los Santos' request in the 48th Street apartment, but without her being present, and then returned to the apartment and handed her a portion of the cocaine?* Would a defendant who purchased a pound of cocaine at the request of fifteen friends be guilty of distribution if he dropped off an ounce at the homes of each of his fifteen friends and kept the remaining ounce for himself? Each of these examples would involve, under the defendants' view of the statute,

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* If the answer under the defendants' view of the statute would be that no distribution occurred because De Los Santos became a constructive possessor of the drugs as soon as they were delivered to Swiderski, wouldn't this be a complete rejection of Congress' attempt to eliminate "the procuring agent defense"?

difficult questions under the extremely complex law of "constructive possession," questions which would be extremely difficult for a Judge to charge and jury to resolve. Compare *United States* v. *Steward*, 451 F.2d 1203, 1206-07 (2d Cir. 1971); *United States* v. *Febre*, 425 F.2d 107, 111 (2d Cir.), *cert. denied*, 400 U.S. 849 (1970); *United States* v. *Jones*, 308 F.2d 26, 30-31 (2d Cir. 1962) (*en banc*); *United States* v. *Hernandez*, 290 F.2d 86, 90 (2d Cir. 1961).* It is not surprising, then, that Congress avoided these complexities by adopting an extremely straightforward approach to the definition of distribution which focused on the physical passing of drugs from one person to another.

## C. Assuming *Arguendo* There Was Error in the Charge, It Was Harmless.

Even if there was error in the Court's charge, the jury's verdict reflects that it must necessarily have found that the defendants purchased the drugs from Carlton Bush in the 48th Street apartment. Since it clearly cannot be argued, once defendants' entrapment defense was rejected by the jury, that they did not knowingly *cause* this distribution to themselves, they clearly were guilty under 18 U.S.C. § 2(b) of causing a distribution of cocaine. *Cf. United States* v. *Rapoport*, Dkt. No. 76-1291, slip op. at 423, 429-433 (2d Cir., Nov. 4, 1976); but *cf.*

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* The above cited cases indicate that little more, if anything, than an agency relationship with respect to possession is required to find a person in constructive possession. Therefore, under the defendants' view of the statute, the exception they seek for constructive possession would appear to have the effect of reading out of § 802(8) any reference whatsoever to the irrelevancy of an agency relationship in determining whether a distribution has occurred.

*United States* v. *Harold*, 531 F.2d 704 (5th Cir. 1976) (*per curiam*).*

Because the jury by its verdict necessarily found that this distribution occurred, any error in the trial court's instructions concerning a subsequent distribution was harmless. See *United States* v. *Jacobs*, 475 F.2d 270, 283-84 (2d Cir.), *cert. denied sub nom. Thaler* v. *United States*, 414 U.S. 821 (1973); *United States* v. *Baratta*, 397 F.2d 215 (2d Cir.), *cert. denied*, 393 U.S. 939 (1968).**

## D. Conclusion

The District Court correctly instructed the jury that the essential element of a distribution of narcotics is a physical transfer of narcotics from one person to another.

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* In *United States* v. *Harold*, *supra*, the Fifth Circuit stated that a person who merely intended to receive heroin as a user could not be guilty of aiding and abetting a distribution. However, *Harold* was decided under 18 U.S.C. § 2(a), and not under § 2(b), and to the extent that it implies that a defendant cannot cause a distribution to himself, the decision simply ignores the unequivocal language of § 2(b).

** Of course there was a good deal of additional evidence which, if believed, could support the view that Swiderski and De Los Santos intended to distribute the cocaine to another individual, including the fact that the defendants had purchased $1250 worth of cocaine (21.5 grams, not 4.1 grams as Swiderski claims, Br. at 21 n.14), and had agreed to the purchase of 3 more ounces. But since the trial court's instruction permitted a conviction if the jury disbelieved this evidence, it is impossible to determine whether the jury credited this testimony or not. The contrary is true, however, as to the distribution which occurred at the 48th Street apartment. For once the jury discredited the defendants' entrapment defense, it necessarily found that De Los Santos and Swiderski knowingly caused this distribution to themselves.

But even if there were error in the charge, the jury's verdict reflects that it necessarily found that the defendants caused a distribution of cocaine.*

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* While we firmly believed that the trial court's charge adequately and clearly explained the element of intent to distribute, if this Court were to conclude otherwise, the appropriate remedy would not be a reversal, but rather a vacation of the sentence and a remand with directions to the District Court to amend the judgment to reflect a conviction under 21 U.S.C. § 844 for simple possession and to resentence under that section.

It is clear that 21 U.S.C. § 844, which prohibits the possession of narcotic drugs, is a lesser included offense to a 21 U.S.C. § 841(a) charge, which requires a distribution or an intended distribution. All of the elements necessary to sustain a conviction under § 844 are required under § 841(a), the sole difference being that a conviction under the latter section requires the jury to find the additional element of the existence of an intent to distribute.

By convicting the defendants, and thereby rejecting their entrapment defense, the jury necessarily found that the defendants had performed acts which satisfied all of the elements necessary to sustain a conviction under 21 U.S.C. § 844. Compare *United States* v. *Harary*, 457 F.2d 471, 477-78 (2d Cir. 1972). Indeed, the central thesis of defendants' argument on appeal is that, since Swiderski and De Los Santos were already in joint possession of the contraband, a passing of the drug between them would not suffice to prove a distribution. Therefore, it is entirely appropriate to remand for amendment of the judgment and a resentencing. See *United States* v. *Rivera*, Dkt. No. 74-2115 (2d Cir., Mar. 13, 1975), slip op. at 2287, reported in amended form in 513 F.2d 519, 531-32 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975) (where this Court initially remanded for resentencing under a different statute, and only after the Government communicated to the Court its view that the facts proved at trial could not support a conviction under the different statute, the Court amended its opinions accordingly); *United States* v. *Reid*, 517 F.2d 953 (2d Cir. 1975); *United States* v. *Rivera*, 521 F.2d 125 (2d Cir. 1975); *cf. United States* v. *Jacobs*, *supra*, 475 F.2d at 283-84.

## POINT II

### Any Error Resulting from the Prosecutor's Single Question Concerning De Los Santos' Post-Arrest Silence Was Waived By The Failure to Object, and Was in Any Case Harmless.

Defendants contend that reversible error was committed when the prosecutor asked defendant De Los Santos whether she had offered the arresting officers the same explanation for the alleged offense she provided at trial.* This claim is meritless.

The prosecutor's single question touching upon De Los Santos' post-arrest silence was as follows:

> "Q. [Mr. Batchelder] Did you ever say to the arresting officers that 'Marty Davis did this to us' when you were arrested?"

No objection was made by defense counsel to this question, and De Los Santos promptly responded that, when she had been advised of her constitutional rights, she had elected to speak with an attorney. Her response was as follows:

> A. "When I was arrested I was given my rights and I had told them that I wanted to see a lawyer, I wanted to know if it was possible for me to make Night Court, because this was in the afternoon, and they told me 'Forget about it', there was no Night Court." (Tr. 223).

Both the prosecutor and defense attorneys quickly recognized that De Los Santos' explanation for her post-

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* Her explanation, of course, was that she had parted with $1250 in the apartment at West 48th Street in order to secure a safe exit. (Tr. 223).

arrest silence had completely undercut the Government's attempt to use her silence as a prior inconsistent statement. Consequently, Government counsel neither pursued this line of questioning nor argued this point to the jury, and defense counsel did not ask that the question and response be stricken or request a cautionary instruction.* Moreover, this matter was of such little consequence that De Los Santos' experienced counsel did not specifically raise this issue on appeal. Rather, this issue has been raised by Swiderski and incorporated by reference into De Los Santos' Brief pursuant to Federal Rule of Appellate Procedure 28(i).**

There can be no question but that the prosecutor committed an inadvertent error in questioning De Los Santos about her post-arrest silence. The Supreme Court in *United States* v. *Hale*, 422 U.S. 171 (1975), using its supervisory powers over the lower federal courts, held such questioning to be improper, and in *Doyle* v.

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* It is clear that De Los Santos would have been entitled to a cautionary instruction had she requested one. See *United States* v. *Rose*, 500 F.2d 12, 17 (2d Cir. 1974), *vacated and remanded*, 422 U.S. 1031 (1975), *on remand*, 525 F.2d 1026 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 5924 (Mar. 8, 1976).

** Since a criminal defendant may not challenge the admission of evidence against him on the grounds that it was obtained by exploitation of a violation of a third party's rights, even if the third party is a co-defendant, Swiderski does not have standing to raise this issue on appeal. See *Alderman* v. *United States*, 394 U.S. 165, 171-72 (1969); *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Untied States* v. *Wright*, 524 F.2d 1100, 1102 (2d Cir. 1975); *United States* v. *Re*, 372 F.2d 641, 643-44 (2d Cir.), *cert. denied*, 388 U.S. 912 (1967); *United States* v. *Lisk*, 522 F.2d 228 (7th Cir. 1975) (Stevens, *J.*), *cert. denied*, 423 U.S. 1078 (1976); *Dearinger* v. *Rhay*, 421 F.2d 1086, 1087-88 (9th Cir. 1970); *United States* v. *Beigel*, 370 F.2d 751, 756 (2d Cir.), *cert. denied*, 387 U.S. 930 (1967); *United States* v. *Bozza*, 365 F.2d 206, 223 (2d Cir. 1966).

*Ohio*, 44 U.S.L.W. 4902 (U.S. June 17, 1976), the Court reached the same result on constitutional grounds.

However, in failing to object to the prosecutor's question at trial, thereby depriving the trial judge of the opportunity to correct any error, defendants waived any right to raise this issue on appeal. *United States* v. *Rose*, *supra*, 500 F.2d at 17, 525 F.2d at 1027; see *United States* v. *Indiviglio*, 352 F.2d 276, 280-281 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). Defendants' argument that the waiver rule articulated by this Court in *United States* v. *Rose*, *supra*, and *United States* v. *Indiviglio*, *supra*, should not be applied in cases of constitutional dimension ignores the plain fact that both *Rose* and *Indiviglio* involved constitutional claims and the Court nevertheless held the claims to be waived by the failure to object. Defendants' argument also fails to take into account the fact that in *Estelle* v. *Williams*, 44 U.S.L.W. 4609, 4611-12 (U.S. May 3, 1976), the Supreme Court commented favorably, in the context of a case involving error of a constitutional magnitude, on this Court's statement of the waiver rule in *United States* v. *Indiviglio*, *supra*.*

Moreover, in the context of this case, it is difficult to see how the impact of a single question asked by the

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* The Supreme Court quoted the following language from *Indiviglio*:

> "'Federal courts, including the Supreme Court, have declined to notice [alleged] errors not objected to below even though such errors involve a criminal defendant's constitutional rights.'" 44 U.S.L.W. at 4612 n.3.

Commenting on the foregoing language, the Court had this to say:

> "The reason for this rule is clear: if the defendant has an objection there is an obligation to call the matter to the court's attention so the trial judge will have an opportunity to remedy the situation." *Id.*

prosecutor during the course of an extensive cross-examination could have had the slightest effect on the trial.* First, De Los Santos' response fully disposed of any possible argument that her silence was inconsistent with her later trial testimony. This was recognized both by the prosecutor who neither pursued this line of questioning nor argued any inconsistency to the jury and by the defense attorneys who withheld objection and declined to ask for a cautionary instruction. The failure of De Los Santos' counsel to specifically raise this point on appeal reinforces the view that the matter was of no consequence. Second, the telling blow to the defendants' defense has nothing to do with this incident; rather the defense was completely undercut first by the defendants' incredible assertions that they carried several thousand dollars in cash on June 3, 1975 into a rundown apartment building because they planned to make purchases at the boutique show and second by the Government's rebuttal witnesses whose testimony exposed this story as a complete fabrication.

It is clear that whether the plain error standard of Federal Rule of Criminal Procedure 52(b) or the harmless error standard of *Chapman* v. *United States*, 386 U.S. 18, 21-22 (1967),** is applied, the error caused by

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* The facts of the instant case are readily distinguishable from those in *Doyle* v. *Ohio, supra*, and its companion case, *Wood* v. *Ohio*, both of which involved extensive questioning concerning post-arrest silence and in which a prompt objection was taken to each question. *United States* v. *Rose, supra*, also involved a *series* of questions concerning the failure to immediately give the same explanation which was later offered at trial.

** In *Doyle* v. *Ohio, supra*, 44 U.S.L.W. at 4904-4059, the Court specifically noted that the State of Ohio did not contend that harmless error was involved.

the prosecutor's asking a single question about post-arrest silence should not serve as the basis for reversing the convictions.

## CONCLUSION

**The judgments of conviction should be affirmed.**

Respectfully submitted,

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*United States Attorney for the Southern District of New York, Attorney for the United States of America.*

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AFFIDAVIT OF MAILING

State of New York )
: ss.:
County of New York)

MARC MARMARO, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 27th day of December, 1976 he served ~~a copy of~~ the within Brief
2 copies
by placing the same in a properly postpaid franked envelope addressed:

Julius Wasserstein, Esq.
Lasher & Wasserstein, Esqs.
26 Court Street
Brooklyn, New York 11242

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defenders Services Unit
509 United States Courthouse
New York, New York 10007
Attention: Jonathan J. Silbermann, Esq.

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Marc Marmaro
MARC MARMARO

Sworn to before me this
27th day of December, 1976.

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1341575
Qualified in Kings County
Commission Expires March 30, 1977